Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GLEN PRIOR, and LAW FIRM OF GLEN PRIOR, INC., P.S.

Petitioners

v.

SPLASH DESIGN, INC.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of The State Of
Washington, Division I

PETITION FOR WRIT OF CERTIORARI

PRO-SE PETITION BY:
GLEN PRIOR, INDIVIDUALLY,
AND GLEN PRIOR, PRESIDENT
OF LAW FIRM OF GLEN PRIOR, INC., P.S.
3700 PACIFIC HWY E. #310
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67 pp

QUESTIONS PRESENTED FOR REVIEW

1. Should a non-party attorney be made a judgment debtor to pay a party judgment creditor the amount of $54,701.57 plus interest when the non-party was served with neither summons nor complaint, when the non-party was given no notice and opportunity to be heard, and when the non-party was adjudged not to be a party to the action?

2. Should a party and his attorney be sanctioned $54,701.57 plus interest as a Civil Rule 11 sanction when the party had no notice of any CR11 violation, had no opportunity to be heard on the issue, and when such sanctions included paying the opposing party's attorney's fees for drafting and filing the complaint, for drafting and filing its denied motion to quash a subpoena for deposition, for drafting and filing its motion demanding an Answer from another party, and for drafting and filing a response to another party's counterclaim?

3. Should a party have a right to have a trial on the issue of breach of fiduciary duty when reasonable minds could differ as to whether the party defendant breached a binding instruction from the parties to release some of the escrow funds?

4. Should the Court of Appeals award attorney's fees on appeal based on a "frivolous" appeal when the appeal raised issues that the Court of Appeals acknowledged it did not consider and Petitioners had no opportunity to be heard?

CORPORATE DISCLOSURE

In re petitioner Law Firm Of Glen Prior, Inc., P.S., there is no parent or publicly held company owning 10% or more of the corporation's stock.

THE PARTIES TO THE PROCEEDING IN THIS COURT

GLEN PRIOR, petitioner

LAW FIRM OF
GLEN PRIOR, INC., P.S. , petitioner

SPLASH DESIGN, INC. , respondent

Note that in the lower court, MEESAUN LEE was a named party but was dismissed from the suit by stipulation.

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I. 1. A non-party attorney should not be made a judgment debtor to pay a party judgment creditor the amount of $54,701.57 plus interest when the non-party was served with neither summons nor complaint, when the non-party was given no notice and opportunity to be heard, and when the non-party was adjudged not to be a party to the action.

II. A party and his attorney should not be sanctioned $54,701.57 plus interest as a Civil Rule 11 sanction when the party had no notice of any CR11 violation, had no opportunity to be heard on the issue, and when such

sanctions included paying the opposing party's attorney's fees for drafting and filing the complaint, for drafting and filing its denied motion to quash a subpoena for deposition, for drafting and filing its motion demanding an Answer from another party, for attending depositions and settlement conferences, and for drafting and filing a response to another party's counterclaim.

III. A party should have a right to have a fair trial on the issue of breach of fiduciary duty when reasonable minds could differ as to whether the party defendant breached a binding instruction from the parties to release some of the escrow funds.

IV. The Court of Appeals should not have awarded attorney's fees on appeal based on a "frivolous" appeal when the appeal raised issues that the Court of Appeals acknowledged it did not consider and Petitioners had no opportunity to be heard on the issue.

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Petitioners Glen Prior and Law Firm of Glen Prior, Inc., P.S., respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Washington, Division II, entered in this proceeding on December 4, 2000.

OPINIONS BELOW

The unpublished decision of the Court of Appeals (December 4, 2000) is reported at 103 Wash.App. 1036, (Wash.App. 12/04/2000) Splash Design, Inc. v. Lee. The Washington Supreme Court denied the petition for review on September 5th, 2001 (No. 70811-8, September 5th, 2001).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (a). "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . .where any title, right privilege, or immunity is specially set up or claimed under the Constitution. . . ." The Washington Supreme Court denied the petition for review on September 5th, 2001 (No. 70811-8, September 5th, 2001).

RULES INVOLVED

This case involves Civil Rule 11 of the Washington State Civil Rules. See Appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Two Constitutional Amendments are cited: V ["No person shall. . .be deprived of life, liberty, or property, without due process of law. . . .]; XIV ["No state shall. . .deprive any person of. . .due process."].

STATEMENT OF THE CASE

At the close of trial, the Washington Superior Court for King County sanctioned attorney Glen Prior under Washington Civil Rule 11 in the amount of $54,701.57 plus interest and placed him as a judgment debtor subject to statutory supplemental proceedings as a judgment debtor. Glen Prior was not a party in the action, received neither a summons nor complaint, nor were there any pre-trial CR 11 motions filed against him. The Court also sanctioned Petitioner Law Firm of Glen Prior, Inc., $54,701.57, which was a party to the action. Like non-party Glen Prior, there was no pre-trial CR11 motions filed against the firm, and no opportunity to be heard on the issue for a sanction involving over twice the amount of the award in the case.

On 02-18-98 Plaintiff/Respondent Splash Design, Inc. (Splash) brought this lawsuit against Defendant/Petitioner Karl Y. Park (Park), an

attorney; Defendant/Petitioner Glen Prior, Inc. P.S., (the Law Firm) Park's employer; and Defendant Messaun Lee (the Buyer) who has since been dismissed from the action and is no longer a party to the litigation. (See CP 567.)

The Complaint alleged that on 01-21-98 Splash and the Buyer entered into an agreement by which the Buyer would purchase Splash's Frame It business located at 605 Broadway East in Seattle for $25,000. (CP 568.) Splash and the Buyer appointed Park to serve as escrow agent. Id.

The deal closed, in substantial part, on Saturday, 01-31-98. (App. Ct. Dec. 2.) At the closing Park issued a check, post-dated to 02-02-98, to Splash for the purchase price, less a $5,000.00 hold back to be released after the subsequent execution of a sublease. (Id.; CP 568.) However, on Monday 02-02-98, before the check was negotiated, Park discovered that there were tax liens against a corporation that had previously done business at the same location under the same name "Frame It." (App. Ct. Dec. 2.) Park concluded that there was a possibility that the liens had attached to the property being sold to the Buyer and thus that the Buyer could be liable for the taxes. Id. Park then stopped payment on the check, leaving the funds in escrow, and contacted Splash and the Buyer to inform them

of this action and to advise them each to retain separate counsel. (Id. at 2-3.)

The next few days Splash and the Buyer, through their separate counsel, began to renegotiate the transaction. (Id. at 3.) Later that week, on 02-06-98, Buyer's counsel expressed concern about the "successor liability" between the two "Frame It" businesses and directed Park not to release any funds to Splash until "you receive joint instructions by the buyer and seller as to how those proceeds are to be distributed." (CP 294-95.) On 02-09-98 Buyer's counsel authorized Park to release the escrow funds, less a $10,000 holdback, until a Certification of Discharge was obtained from the Internal Revenue Service. (CP 297.) Buyer's counsel also directed Park to contact him "if this letter is not sufficient to allow you to release funds." (CP 297.) Later that day Park did contact Buyer's counsel as well as Seller's counsel, sending to each for his client's approval and signature a supplement to the settlement statement to authorize the release of the funds less the $10,000 holdback. (CP 298-302.) Park solicited both parities' approval because the joint escrow instructions required him to "disburse the deposited funds pursuant to the terms of the settlement statements which have been examined and approved by the parties." (CP 243.)

Splash never executed the supplemental statement as requested; the Buyer did execute it but did not forward it to Park until ten days later, 02-19-98 (C.P. 311). That same day, 02-19-98, Park issued a cashiers check, less the $10,000 holdback, as instructed by Buyer. (CP 313.) The next day, 02-20-98 Park and the Law Firm were served with Splash's complaint in this action. (CP 317.)

The complaint alleged breach of fiduciary duty and violation of the Consumer Protection Act against Park and various theories of vicarious liability against the Law Firm. The complaint also requested attorneys fees but failed to state any ground. (CP 592.) Park and the Law Firm answered, and subsequently amended the answer, asserting various arguments and defenses, many of which were based on Splash's alleged failure to mitigate its damages. (See CP 106-139, ¶¶ C, F, G, H, I, J, L, M.)

After discovery, Splash moved for dismissal of Park and the Law Firm's defenses and for summary judgment based on Park's alleged breach of fiduciary duty. Although Splash's motion challenged the defenses, it did not move for Rule 11 sanctions or any other sanctions nor did it request attorneys fees on any basis. The Trial Court granted the motion in part, concluding there was a breach of fiduciary duty and dismissing several defenses, characterizing them,

for the first time, as "frivolous." (CP 349-50.) However, the court did not find or even mention a possible Rule 11 violation nor did it award attorneys fees. (Id.) Moreover, it did not dismiss four of Park and the Law Firm's defenses and did not grant summary judgment on Splash's Consumer Protection Act claim, or vicarious liability theories. (Id.)

At no time did Splash make a formal motion asserting a Rule 11 violation or make any other motion separately seeking attorneys fees as sanctions. However, in its trial brief Splash requested, without elaboration or discussion, attorneys fees and costs "in this matter" asserting that they were recoverable, inter alia, "because they are attributable to frivolous claims raised by the Law Firm Defendants, RCW 4.84.185 & Civil Rule 11." (CP 682.)

At the close of trial, without ever having informed Park, the Law Firm or its counsel Glen Prior, personally, that she was considering imposing sanctions against them, the trial court awarded Splash over $54,000 consisting of all its costs and attorneys fees in the entire litigation based on Rule 11, RCW 4.84.185, the Court's inherent equitable power and the Consumer Protection Act. (CP 561-64.)

Park and the Law Firm appealed. The Court of Appeals affirmed in all respects except it affirmed the award of sanctions based on Rule 11 alone and did

not consider any other basis. (Ct. App. Dec. 11-12.) The Court of Appeals also awarded Splash its attorneys fees and costs on appeal pursuant to RAP 18.9(a), even though a substantial part of the appeal was devoted to Defendants' arguments concerning the nonapplicability of the Consumer Protection Act, an argument no one suggested was frivolous, and the alternative bases for awarding attorneys fees which the Court of Appeals did not consider.

ARGUMENT

Under Washington CR54(a)(1), a judgment "is the final determination of the **parties in the action**...." (emphasis supplied). It is the general rule that "one is not bound by a judgment in personam in a litigation in which he is not designated as a **party** or to which he has not been made a **party** by service of process." Emphasis supplied. City of Seattle v. Fontanilla, 128 Wn.2d 492, 502, 909 P.2d 1294, (Wash. 1996), citing Martin v. Wilks, 490 U.S. 755, 761, 109 S.Ct. 2180, 2184, 104 L.Ed.2d 835 (1989) (quoting Hansberry v. Lee, 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940)).

The court in Martin cited with approval the words of Justice Brandeis in Chase National Bank v. Norwalk, 291 U.S. 431 (1934):

> The law does not impose upon any person

> absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights. *Id.* at 441. Martin, 490 U.S. 755 @ 763-764.

Glen Prior, as an individual, is not a party in the above action. Therefore, he did not get his day in court to defend against the amount, if any, imposed upon him as a "Judgment Debtor" in the Judgment. There is a deep rooted historic tradition in this country that everyone should have his or her own day in court. See Martin v. Wilks, 490 U.S. 755 (1989), citing to 18C Wright, A. Miller, & E. Cooper, Federal Practice and Procedure, 4449, pg.417 (1981). Joinder of a party is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree. To impose judgment against a non-party in a legal action is violative of due process under the federal constitution and denies the non-party his or her fundamental right of access to the court to defend ones' self against an adverse Judgment by a party (U.S. Const., XIVth Amendment; see also Mathews v. Eldridge, 424 U.S. 319 (1976)

(Governmental procedure that denies or negatively impacts a life, liberty, or property right is constitutional if the procedure gives the injured party notice and opportunity to be heard by an unbiased tribunal, and the formality and timing of the hearing are properly balanced; access to the courts is a fundamental right under common law. Carter v. University of Washington, 85 Wn.2d 391 (1975)).

This is an issue of great legal and public significance: Is it a denial of due process for a non-party to be sanctioned $54,701.97 plus interest and made a judgment debtor subject to statutory supplemental proceedings for judgment debtors when the non-party was served with neither a summons nor complaint and when he had no notice and opportunity to defend himself? Is it a denial of due process for a party to be sanctioned $54,701.97 under CR11 when such party received no notice of CR11 sanctions until the eve of trial when the alleged sanctionable documents had already been dismissed well before trial and had no opportunity to be heard on the issue? Is it a denial of due process for the court to take away petitioner's right to have a trial on the issue of breach of fiduciary duty when reasonable minds could differ as to whether the party defendant/petitioner breached a binding instruction

from the parties to release some of the escrow funds? And is it a denial of due process when the Court of Appeals awarded Respondent its attorney's fees on appeal based on a "frivolous" appeal when the appeal raised issues that the Court of Appeals acknowledged it did not consider, and when the Court gave no opportunity to Petitioners to be heard on the issue before imposing sanctions?

The CR11 sanctions against Petitioners included paying all of Respondent's costs and attorney's fees in preparing, filing, and serving the complaint to all Defendants; paying Respondent's costs and attorney's fees in moving for Defendant Lee's Answer to the Complaint; Respondent's costs and attorney's fees for Replying to Defendant Lee's Counterclaim; Respondent's costs and attorney's fees in bringing its extensive motion, subsequently denied, to quash a subpoena for deposition of a witness; fees and costs for attending the settlement conference, the depositions, and all fees and costs expended in litigating with Defendant Lee and her counsel. It was a denial of due process for the court to impose sanctions of all Respondent's attorney's fees after trial under CR11 when during the litigation there was no CR11 motion made nor was there any hearing on the issue. The Washington Supreme Court has made it clear that that conduct is

not proper:

> Normally, such late entry of a CR 11 motion would be impermissible, since without prompt notice regarding a potential violation of the rule, the offending party is given no opportunity to mitigate the sanction by amending or withdrawing the offending paper. See Bryant v. Joseph Tree, Inc., 119 Wash. 2d 210, 228, 829 P.2d 1099 (1992)](Andersen, J., concurring in part, dissenting in part).
>
> Prompt notice of the possibility of sanctions fulfills the primary purpose of the rule, which is to deter litigation abuses.
> [25] [Deterrence] is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end. A proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant sanctions.
> [26] In re Yagman, 796 F.2d 1165, 1183 (9th Cir.), amended, 803 F.2d 1085 (1986), mandamus granted sub nom. Brown v. Baden, 815 F.2d 575, cert. denied sub nom. Real v. Yagman, 484 U.S. 963, 98 L. Ed. 2d 390, 108 S. Ct. 450 (1987). See also William W.

> Schwarzer, Sanctions Under the New Federal Rule 11 -- A Closer Look, 104 F.R.D. 181, 197-98 (1985) (Rule 11 sanctions must be brought as soon as possible to avoid waste and delay). Both practitioners and judges who perceive a possible violation of CR 11 must bring it to the offending party's attention as soon as possible[footnote omitted]. Without such notice, CR 11 sanctions are unwarranted. Bryant at 224, [Bryant v. Joseph Tree, Inc.], 119 Wash. 2d 210, 224, 829 P.2d 1099 (1992).

Biggs v. David B. Vail, 124 Wash. 2d 193, 876 P.2d 448 (Wa. 07/07/1994), 1994.WA.40529 <http://www.versuslaw.com>; 876 P.2d 448; 124 Wash. 2d 193, at above stated paragraphs.

The Biggs' court further stated that,

> CR 11 is not meant to act as a fee shifting mechanism, but rather as a deterrent to frivolous pleadings...In deciding upon a sanction, the trial court should impose the least severe sanction necessary to carry out the purpose of the rule. ...Should a court decide that the appropriate sanction under CR 11 is an award of attorney fees, it must limit those fees to the amounts

> reasonably expended in responding to the sanctionable filings. Generally, this award of reasonable fees should not exceed those fees which would have been incurred had notice of the violation been brought promptly.

Biggs v. David B. Vail, 124 Wash. 2d 193, 876 P.2d 448 (Wa. 07/07/1994), 1994.WA.40529 <http://www.versuslaw.com>; 876 P.2d 448; 124 Wash. 2d 193, para.21, 38.

The U.S. Supreme Court has stated that,

> Freedom of access to the courts is a cherished value in our democratic society. Incremental changes in settled rules of law often result from litigation. [footnote #8 omitted]. The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help. There is, and should be, the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only

> deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means [footnote #9 omitted]. This Court, above all, should uphold the principle of open access. Talamini v. Allstate Insurance Co., 1985.SCT.1345 <http://www.versuslaw.com>, 470 U.S. 1067, 105 S. Ct. 1824, 85 L. Ed. 2d 125, 53 U.S.L.W. 3683 (1985).

The Trial Court assessed all of Splash's attorneys fees and costs in this action against Defendants Park, the Law Firm and non-party Glen Prior, individually, as a sanction for "repeated violations of CR 11."[1] (CP 564.) The sanction imposed exceeded $54,000, more than double the damages awarded. (CP 561-64.)

The Trial Court has discretion in awarding Rule 11 sanctions but that discretion is not without limits. On appeal, the award must be set aside if manifestly unreasonable or based on untenable grounds or reasons. Washington State Physicians Ins. Exch. & Ass'n v. Fissons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). In this case the Court of Appeals

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recognized this broad standard of review, even cited some of the relevant cases, but erred by ignoring applicable principles adopted in this Court's decisions construing Rule 11, including in particular State ex rel Quick-Ruben v. Verharen, 136 Wn.2d 888, 969 P.2d 64 (1998) (en banc); Biggs v. Vail, 124 Wn.2d 193, 876 P.2d 448 (1994) (en banc) (Biggs II); and Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 829 P.2d 1099 (1992). In this regard the Court of Appeals' decision affirming the Trial Court's award of Rule 11 sanctions is in direct conflict with those cases and due process. The Trial Court's imposition of Rule 11 sanctions and the Court of Appeals' blanket affirmance of the award conflicts with these Supreme Court decisions in several distinct ways. These may be divided into three broad categories: insufficient notice, inadequacy of the stated reasons for imposing the sanctions, and failure to limit the sanction to the fees spent responding to the sanctionable conduct.

The Trial Court concluded that Rule 11 sanctions were appropriate because of "repeated violations of Rule 11." (CP 564.) Yet neither Park, the Law Firm nor Glen Prior individually were ever given any proper or meaningful notice that they were accused of a Rule 11 violation or that the court would consider imposing a Rule 11 sanction. Within

a reasonable time after the initial Answer was filed neither the Trial Court nor Splash provided formal or informal notice that this pleading arguably violated Rule 11 or that sanctions would be considered or sought. Within a reasonable time after the Amended Answer was filed neither the Trial Court nor Splash provided formal or informal notice that this pleading arguably violated Rule 11 and that sanctions would be considered or sought. Within a reasonable time after discovery papers were submitted neither the Trial Court nor Splash provided formal or informal notice that these papers arguably violated Rule 11 and that sanctions would be considered or sought. And within a reasonable time after summary judgment memoranda were submitted neither the Trial Court nor Splash provided formal or informal notice that these papers arguably violated Rule 11 and that sanctions would be considered or sought.

Despite these failures to provide timely notice with respect to specific papers, the Court of Appeals held that Rule 11 notice procedures were adequate primarily because in two places in the record Splash had indicated it wanted attorneys fees from the Defendants (although not from Glen Prior individually).

First, the Court of Appeals apparently regarded as significant for Rule 11 notice procedures that Splash asked for attorneys fees in the Complaint without stating the grounds for the request. (Ct. App. Dec. 10.) This request in the Complaint, of course, was made before Defendants had answered or submitted any papers whatsoever. Second, the Court of Appeals noted that on the eve of trial Splash included in its trial brief a fragment of a sentence arguing to the extent pertinent, that its costs and attorneys fees in this matter are recoverable "because they are attributable to frivolous claims raised by the Law Firm Defendant, RCW 4.84.185 & Civil Rule 11." (Ct. App. Dec. 10.) This request contained no specification of the claims deemed frivolous, nor the pleadings, motions, legal memoranda or other papers in which they appeared.

In Biggs II this Court set out certain "requirements" governing the award of fees and sanctions under CR 11. See Quick-Ruben, 136 Wn.2d at 905, 969 P.2d at 72. Among them were requirements regarding notice. Biggs II, 124 Wn2d at 198-99, 876 P.2d at 451-52. In this regard the Court stated: "Both practitioners and judges who perceive a possible violation of CR 11 must bring it to the offending party's attention as soon as possible. Without such notice, CR 11 sanctions are

unwarranted." Id. at 198, 876 P.2d at 452 (citing Bryant, 119 Wn.2d at 224, 829 P.2d at 1107).

The Court explained that normally awarding sanctions at the end of trial, as was done in the instant case, "would be impermissible, since without prompt notice regarding a potential violation of the rule, the offending party is given no opportunity to mitigate the sanction by amending or withdrawing the offending paper. Prompt notice of the possibility of sanctions fulfills the primary purpose of the rule, which is to deter litigation abuses." Id. at 198, 876 P.2d at 451. The Court elaborated on the point:

> [Deterrence] is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end. A proper sanction assessed at the time of the transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant sanctions.

Id. (quoting In re Yagman, 796 F.2d 1165, 1183, amended, 803 F.2d 1085 (9th Cir. 1986), mandamus granted sub. nom. Brown v. Baden, 815 F.2d 575 (9th Cir. 1987), cert. denied, 484 U.S. 963, 108 S. Ct. 450, 98 L. Ed. 2d 390 (1987)).

The Court of Appeals' decision is in conflict with these principles in two respects. First, the two

instances in which Splash requested attorneys fees and on which the Court of Appeals principally relied for the required Rule 11 notice were certainly not the kind of "prompt" notice that would either deter further abuse or allow mitigation. The first instance was the request in the Complaint, submitted before Defendants submitted any pleading or papers, and thus cannot be deemed "notice" of some immediate past transgression of Rule 11. The only other "notice" cited by the Court of Appeals was the request made in Splash's trial brief, submitted on the eve of trial, which came months after the initial and amended answers were served and filed, months after discovery was served and completed, and months after summary judgment memoranda had been submitted.

Second, the Court of Appeals' decision also conflicts with this Court's decisions and due process because the notice fails to provide even the most general or rudimentary notice that would tend to identify what claim in what signed document was alleged to be frivolous. Biggs II and Bryant each make clear that proper notice must contain at least a modicum of specificity to enable the alleged transgressor to know what part of what paper allegedly offends Rule 11. See Biggs, 124 Wn.2d at 198, 876 P.2d at 451 (offending party must be given

some specific notice of offending conduct to enable him to mitigate by amending or withdrawing whatever is offensive); Bryant, 119 Wn.2d at 224, 829 P.2d at 1007 ("Rosenberg and Koch requested in their appellant's reply brief that sanctions be imposed against Bolin. They specifically cited Bolin's motion to disqualify Edwards and his law firm as meriting the imposition of Rule 11 sanctions." (emphasis added)).

In the instant case, neither Park, the Law Firm nor Prior, individually, received any fair notice that was sufficiently prompt or specific as required by Biggs II and Bryant and due process.

At least twice, first in Biggs II, then again in Quick-Ruben, this Court has made the following statement:

> [I]n imposing CR11 sanctions it is incumbent upon the Court to specify the sanctionable conduct in its order. The Court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make reasonable inquiry into the law or facts or the paper was filed for an improper purpose.

Quick-Ruben, 136 Wn. 2d at 904, 969 P.2d at 72 (quoting Biggs II, 124 Wn.2d at 201, 876 P.2d at 453. In Biggs II, this Court indicated that the trial

court does not satisfy this requirement unless it "make[s] explicit findings as to which filings violated CR11, if any, as well as how such pleadings constituted a violation." 124 Wn.2d at 202, 876 P.2d at 453 (emphasis added).

In the instant case the Trial Court simply failed to make the requisite explicit findings. Although the court purported to find violations under both prongs of Rule 11, it failed to make the requisite findings necessary to either.

First, the Trial Court found that a number of Defendants' arguments were "frivolous and unsubstantiated," "discredited," "rejected," or "baseless." (See Findings of Fact and Conclusion of Law ¶¶ 11, 19, 36-38, CP 575-81.) But the court failed to conduct any inquiry or make any finding with respect to whether Park, the Law Firm or their attorney Glen Prior made a reasonable inquiry into the law or facts with respect to these claims. Such a finding is essential to establishing a Rule 11 violation under the first prong of the Rule. See Bryant, 119 Wn.2d at 220, 829 P.2d at 1105.

Second, the Trial Court concluded that Petitioners' purpose in raising and pursuing these claims was to harass the agents and employees of Plaintiff. (Findings of Fact, Conclusions of Law ¶

37, CP 581.) However, this conclusion is simply not supported by any explicit findings with respect to Petitioners' purposes. Moreover, in the Trial Court's oral decision, incorporated into the Findings by reference, the Trial Court states that, in fact, Defendants' "motivation here was a misguided attempt to pursue self protection . . . to avoid the responsibility for an error that had been committed in their escrow capacity." (Tr. 230.) But this is no improper purpose. This same motivation or purpose is behind every party's assertion of any affirmative defense—the attempt to pursue self-protection to avoid responsibility or liability for an error or breach. It is the same garden-variety motivation that is behind any defendant's assertion, for example, of the statute of frauds or statute of limitations. Any affirmative defense that ultimately fails is perhaps "misguided," but that alone does not mean the assertion of the defense was for an improper purpose.

In sum, the Court of Appeals' decision conflicts with this Court's Rule 11 decisions and due process because it affirmed the Trial Court's Rule 11 award even though the Trial Court failed to make the essential, explicit findings required by Quick-Ruben, Biggs II, and Bryant and due process.

As noted above, the Trial Court simply awarded Splash the entire amount of its attorneys fees and costs in prosecuting this litigation as a sanction for violating Rule 11. (Findings of Fact, Conclusions of Law ¶ 38, CP 581; Judgment, CP 562-63.). The award included Splash's attorneys fees incurred for reasons that clearly had no connection with any sanctionable conduct. For example, the award included attorneys fees and costs Splash incurred for drafting and filing the Complaint and for other services incurred even before Petitioners' signed or filed any paper whatsoever in the litigation. (CP 547-48.) Moreover, the award included attorneys fees Splash incurred for pre-trial responses to Petitioners' claims, arguments and defenses that survived Splash's summary judgment motion, (CP 549-52.), included all fees incurred litigating with another party defendant (Lee), included time spent in settlement conferences and depositions, and further included Splash's time spent in drafting and filing extensive motions, affidavits, and replies in unsuccessfully attempting to quash a subpoena for discovery, none of which could be deemed a CR11 violation by Petitioners.

This Court has directed that "should a Court decide that the appropriate sanction under CR11 is an award of attorneys fees, it must limit those fees to

the amounts reasonably expended in responding to the sanctionable filings." Biggs II, 124 Wn.2d at 201, 876 P.2d 448. Thus, it is an abuse of discretion for the Trial Court to make a Rule 11 award which "most likely exceeds the amount of fees spent actually responding to the sanctionable conduct." See id. Such a broad based sanction over $54,000.00 requires due process protections of notice and opportunity to be heard, and in non-party Petitioner Glen Prior's case, notice and opportunity, and the filing of a summons and complaint in order to place him as a judgment debtor.

The Court of Appeals' decision affirming the Trial Court's award of all Splash's costs and attorneys fees in pursuing this action clearly exceeds the outer limits of a permissible Rule 11 sanction as directed by this Court in Biggs II, and as required by due process under the Vth and XIVth Amendments to the federal constitution.

Summary judgement standards are well established and the Court of Appeals decision acknowledges them but, like the Trial Court, failed to apply them here. (Ct. App. Dec. 4-5.) As the Court of Appeals recognized, when reviewing an order of summary judgment the appellate court engages in the same inquiring as the trial court.

Hollis v Garwall, Inc. 137 Wn.2d 683, 690, 974 P.2d 836 (1999). In deciding the motion all facts and reasonable inferences must be considered in the light most favorable to the nonmoving party. Id. A summary judgment is appropriate only when no genuine issue of material fact exists. CR 56(c).

An escrow agent or holder becomes liable to his principals only for damages that proximately result from the breach of his principals' instruction or from exceeding his authority as conferred by the instructions. National Bank v. Equity Investors 81 Wn.2d 886, 910, 506 P.2d 20, 35 (1973). Generally, whether the escrow agent has breached his duty or met his standard of care is a question of fact that cannot be resolved on summary judgement unless reasonable minds cannot differ on their interpretation of the facts. See Bodin v. City of Stanwood, 130 Wn.2d 726, 741, 927 P.2d 240 (1996).

The Court of Appeals affirmed the Trial Court's grant of summary judgment on the issue of whether Park's conduct as escrow agent for Splash and the buyer constituted a breach of his fiduciary duty. TheCourt held that Park breached his fiduciary duty to Splash in three ways. (See Ct. App. Dec. 4.) Only the third way is addressed here.

Specifically, the Trial Court held, and the Court of Appeals agreed, that Park breached "by refusing to honor the Buyer's written instructions to disburse the purchase price less a $10,000 hold back to the Plaintiffs" on 02-09-98. Id. With respect to this finding the Court of Appeals said only that the "Law Firm's explanation that it was not obliged to honor the buyer's written instructions to disburse the funds on February 9 is not supported by the escrow documents." (Ct. App. Dec. 5-6.) In fact, however, at a minimum, reasonable minds can differ as to whether, under all the circumstances, Park and the Law Firm did comply with all their instructions.

In fact, on 02-06-98, counsel for the buyer instructed Park not to release any funds to Splash "until you receive joint instructions by the buyer and seller as to how those proceeds are to be distributed." (CP 294.) On 02-09-98, the buyer's counsel authorized the release of some of the escrow funds with the proviso that "if this letter is not sufficient to allow you to release funds please feel free to contact me." (CP 297.) As requested Park did contact buyer's counsel the same day, faxing to him and to counsel for Splash a supplement to the settlement statement showing the new escrow disbursement requested and requesting signatures from the parties indicating their approval. (CP 298-

302.) It is reasonable to conclude that this was required by the original escrow instructions which directed Park to "disburse deposited funds pursuant to the terms of the settlement statements which have been examined and approved by the parties hereto." (CP 243.) Splash, however, never signed the supplement and counsel for the buyer did not deliver the signed supplement to Park or the Law Firm until February 19. (RP 219.) Under the circumstances reasonable minds can differ as to whether Park breached a binding instruction from the parties to release some of the funds on February 9.

The Court of Appeals awarded Splash its attorneys fees and costs on appeal under RAP 18.9(a), which permits such an award when a party has filed a "frivolous" appeal. However, an appeal is not frivolous unless, when viewed as a whole, there are no debatable issues upon which reasonable minds may differ and it is so totally devoid of merit that there is no reasonable possibility of reversal. See Quick-Ruben, 136 Wn.2d at 905, 969 P.2d at 73. Streater v White, 26 Wn.App. 430, 434, 613 P.2d 187 (1980).

While the Court of Appeals acknowledged this standard, it failed to apply it in this case. (See Ct. App. Dec. 13-14.) As the foregoing sections of

this Petition demonstrate clearly, there are, at least, debatable issues with respect to the Rule 11 award and the summary judgment determination. Those issues need not be reiterated here.

In addition, however, and wholly apart from the issues already noted, the appeal raised a number of issues that the Court of Appeals acknowledged it did not consider and, thus, had no basis for determining whether they were meritorious or at least, debatable. (See Ct. App. Dec. 11-12.)

For example, the Trial Court's award of attorneys fees was one of the most significant aspects of the appeal for several reasons. Not the least of those reasons was the fact that the attorneys fee award was over $54,000, more than twice the amount of Splash's total damages. Because the Trial Court determined that the attorneys fee award was justified not only under Rule 11 but under the Consumer Protection Act, the frivolous lawsuit statute, RCW 4.84.185, and the court's inherent equitable authority, a substantial portion of the parties' briefing addressed these alternative bases for the attorneys fee award. Defendants raised several issues that are closely debatable. (See Parties' Briefs in Court of Appeals.) However, the Court of Appeals simply did "not consider whether the

sanction was justified on the other grounds invoked by the trial court." (Ct. App. Dec. 11-12.) Nor did the Court give Petitioners an opportunity to be heard on whether sanctions should be awarded when the Court chooses not to consider the other grounds of the appeal briefed by Petitioners. Thus, the Court of Appeals had no proper basis for determining whether the appeal, viewed as a whole, was totally devoid of merit or whether it raised any debatable issues.

CONCLUSION

For each of the foregoing reasons Petitioners respectfully request that this Court grant to Petitioners this Writ for Certiorari.

Dated this 3rd day of December, 2001, at Fife, Washington.

Glen Prior, as Individual Petitioner pro-se, and as President of Petitioner pro-se Law Firm of Glen Prior, Inc., P.S.

Pres.

THE SUPREME COURT OF WASHINGTON

NO. 70811-8

C/A NO. 45076-0-I

SPLASH DESIGN, INC., a Washington Corporation,

Respondent,

v.

MEESAUN LEE, an unmarried woman,

Defendant,

GLEN PRIOR, P.S., INC., a Washington law firm, and KARL Y. PARK, an attorney,

Petitioners.

ORDER

Department II of the Court considered this matter at its September 5, 2001, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

Dated at Olympia, Washington this 5th day of September, 2001.

ss/Gerry L. Alexander

Chief Justice

Splash Design, Inc. v. Lee., 103 Wash.App. 1036, 103 Wash.App. 1036 (Wash.App. 12/04/2000)

[1] Washington Court of Appeals

[2] No. 45076-0-I

[3] 103 Wash.App. 1036, 103 Wash.App. 1036, 2000.WA.0043691 <http://www.versuslaw.cc

[4] December 04, 2000

[5] **SPLASH DESIGN, INC., A WASHINGTON CORPORATION, RESPONDENT\ CROSS-APPELLANT, v. MEESAUN LEE, AN UNMARRIED WOMAN, DEFENDANT, *GLEN PRIOR*, P.S., INC., A WASHINGTON LAW FIRM, AND KARL Y. PARK, AN ATTORNEY, APPELLANTS\ CROSS-RESPONDENTS.**

[6] Source of Appeal: Appeal from Superior Court of King County Docket No: 98-2-04718-6 Judgment or order under review Date filed: 07/21/1999 Judge signing: Hon. Kathleen J. Learned

[7] Counsel: Counsel for Appellant(s) Glen A. Prior Law Firm of Glen Prior Inc PS Trans Pacific

Trade Ctr 3700 Pacific Hwy E #310 Fife, WA 98424-1100 Counsel for Defendant(s) James J. Jameson 805 164th St SE #206 Mill Creek, WA 98012-6316 Counsel for Respondent(s) F. M. Kovach 216 1st Ave S Ste 300 Seattle, WA 98104

[8] Judges: Authored by Mary K. Becker

Concurring: H. Joseph Coleman Ronald E. Cox

[9] The opinion of the court was delivered by:

Becker, A.C.J.,

[10] UNPUBLISHED OPINION

[11] The appellant, a law firm acting as an escrow agent, was negligent in handling the sale of a business and was sued by the seller. The firm's persistence in asserting a barrage of non-meritorious arguments and defenses led to an award of CR 11 sanctions in addition to a judgment for damages in favor of the seller. We affirm the trial court in all respects, and award attorney fees to the respondent as a sanction against the law firm for bringing a frivolous appeal.

[12] Splash Design, a Washington corporation, operated a picture framing business in Seattle under the retail name of 'Frame It'. Splash negotiated the sale of the business to Meesaun Lee. Lee was to pay $25,000 for the equipment,

fixtures, goodwill, inventory and a covenant not to compete. Lee found a lawyer, Karl Park, through a newspaper advertisement. Park was to assist her in the transaction and also to act as escrow agent. Park's employer was the Law Firm of ***Glen Prior***. Splash agreed to pay for half of Park's fees to handle the escrow transaction. Lee separately retained Park to advise her on the purchase.

[13] The deal closed on Saturday, January 31, 1998. Park issued a check to Splash for the purchase price, less a $5,000 holdback to be released after the execution of a sublease. Splash surrendered possession of the business.

[14] The next evening, Park discovered that he had made a mistake in his initial lien search by misspelling the name of the business as 'Flame It' instead of 'Frame It.' On Monday morning, he ran another lien search using the correct name. This time, he found tax liens filed against another corporation, Visible Enterprises, that had previously done business as 'Frame It' at the same location. Park concluded that the liens against Visible had possibly attached to the property being sold to Meesaun Lee and that Lee might be liable for the taxes. Without consulting either Splash or Lee, he stopped payment on Lee's check to Splash. He then contacted Splash and Lee to inform them

of his action and advised them to retain separate counsel.

[15] A few days later, Splash and Lee renegotiated the transaction, agreeing that escrow would release the purchase price to Splash, minus a $10,000 holdback. Lee would apply to the Internal Revenue Service for a certificate of discharge from the federal tax liens, and once the liens were discharged, Splash would receive the remaining $10,000. On February 9th, Lee's attorney faxed a letter to Park, advising him of the agreement and requesting the release of funds. Park prepared supplemental escrow instructions, but when Splash did not sign them, Park at first refused to release the funds. About ten days later, Park sent a cashier's check to Splash upon Lee's signature only.

[16] Splash filed suit against Park and the law firm of ***Glen Prior*** (collectively the Law Firm) on February 18, 1998, alleging breach of fiduciary duty, violation of the Consumer Protection Act and liability of the Law Firm on theories of vicarious liability and negligent supervision. About a week later, Lee received a letter from the IRS stating that a discharge of liens was 'not applicable' because the tax liens relating to Visible Enterprises did not attach to the property of Splash. The Law Firm nevertheless refused to release the remaining $10,000 of the purchase price. The Law Firm took

the position that because Splash had commenced suit, it was 'inappropriate to release any further funds until such litigation was terminated.' Splash moved for immediate disbursement of the $10,000. The trial court granted the motion.

[17] Following a bench trial in July of 1999, the court awarded damages as well as attorney fees to Splash. The Law Firm appeals.

[18] BREACH OF FIDUCIARY DUTY

[19] Before trial, Splash moved for summary judgment on the issue of whether Park's conduct constituted a breach of fiduciary duty. The court granted the motion in an order stating:

[20] Plaintiff is entitled to an award of partial summary judgment that Karl Park breached his fiduciary duty to the Plaintiff (1) by carelessly conducting his initial lien search, (2) by erroneously concluding that the notices of tax liens filed against Visible Enterprises, Inc., attached to any of the property subject to sale in this case, and (3) by refusing to honor the Buyer's written instructions to disburse the purchase price less a $10,000 hold-back to the Plaintiff.

[21] When reviewing an order of summary judgment, this court engages in the same inquiry

as the trial court. Hollis v. Garwall, Inc., 137 Wn.2d 683, 690, 974 P.2d 836 (1999). Summary judgment is appropriate when no genuine issue of material fact exists. CR 56(c). The facts and all reasonable inferences are considered in the light most favorable to the nonmoving party. Hollis, 137 Wn.2d at 690.

[22] An escrow holder is an agent who occupies a fiduciary relationship with all parties to the escrow. National Bank of Washington v. Equity Investors, 81 Wn.2d 886, 909-10, 506 P.2d 20 (1973). The escrow holder must act strictly in accordance with the provisions of the escrow agreement; he must comply with the instructions of the parties, and it is his duty to exercise ordinary skill and diligence, and due or reasonable care in his employment. Equity Investors, 81 Wn.2d at 910. In his fiduciary capacity, he must also conduct the affairs with which he is entrusted with scrupulous honesty, skill, and diligence. Equity Investors, 81 Wn.2d at 910. As an attorney escrow agent, the agent has a duty to exercise that degree of skill, care and learning expected of a reasonably prudent attorney in the State of Washington. See Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 588, 675 P.2d 193 (1983). An escrow agent or holder becomes liable to his principals for

damage proximately resulting from his breach of the instructions, or from his exceeding the authority conferred on him by the instructions. Delson Lumber Co., Inc. v. Washington Escrow Co., Inc., 16 Wn. App. 546, 550, 558 P.2d 832 (1976).

[23] The Law Firm asserts that there are material issues of fact regarding whether Park breached his duty. While generally the issue of whether the standard of care was met is a question of fact, summary judgment is appropriate when reasonable minds could not differ in their interpretation of the facts. Bodin v. City of Stanwood, 130 Wn.2d 726, 741, 927 P.2d 240 (1996). The Law Firm does not explain how Park's initial careless lien search and his failure to discover the error until after the closing met the standard of care of a reasonably prudent attorney. The Law Firm does not persuasively explain why it was reasonable to conclude that the tax liens attached to Splash's property. And the Law Firm's explanation that it was not obliged to honor the buyer's written instruction to disburse funds on February 9 is not supported by the escrow documents. As the trial court correctly perceived, reasonable minds must agree that Park breached his fiduciary duty as an escrow agent.

[24] In addition, Park ceased to represent both

buyer and seller neutrally, as required by the purchase and sale agreement, when, upon discovering the liens, he acted to protect the buyer by canceling the check. As justification for its actions, the Law Firm relies on a provision in the instructions allowing the agent to 'hold all matters in their existing status' in the case of a dispute between the parties. But there was not a dispute between the parties here. And Park did more than merely preserve the status quo. He actively intervened in the transaction when he returned the purchase price to the buyer, Lee, without returning the business to the seller. Nothing in the escrow documents gave Park the authority to step out of the advisory capacity created by the instructions and intervene in the transaction. The purchase and sale contract already contained a remedy for the buyer in the event that undisclosed liens attached to Splash's property:

[25] In the event that the Buyer discovers previously undisclosed liened or leased equipment after closing of the purchase and notifies the Seller, the Seller, within 20 days, shall reimburse the Buyer for the fair market value of the leased equipment or the amount remaining on the liened equipr

[26] The evidence in the record supports only one conclusion: Park's conduct breached his

fiduciary duty.

[27] DISMISSAL OF DEFENSES

[28] Before trial, Splash moved to dismiss nine of the thirteen defenses advanced by the Law Firm in its amended answer. The trial court granted the motion, finding the defenses 'frivolous', and the Law Firm appeals. One defense was the claim that the United States was an indispensable or necessary party to the action. As confirmed by the IRS, the tax liens filed against Visible did not attach to Splash's property. Because the Law Firm failed to prove that the United States had any interest in the case, the defense was properly dismissed.

[29] The trial court also dismissed several claims relating to the conduct of Michael Kovach, attorney for Splash. The Law Firm asserted that Kovach filed the lawsuit without authority from Splash; that he failed to advise Splash when he received the check for the purchase price less the $10,000 holdback; and that it was necessary to join Kovach personally in the lawsuit.

[30] Whether Kovach acted without authority or withheld information from Splash might be relevant issues between Kovach and Splash, but they were irrelevant in the case between Splash and

the Law Firm. And it was not necessary to join Kovach personally in the suit because his acts are imputed to Splash. See Woodhead v. Discount Waterbeds Inc., 78 Wn. App. 125, 133, 896 P.2d 66 (1995). The court did not err in dismissing these defenses.

[31] The trial court also dismissed several defenses alleging negligence on the part of Splash. The Law Firm claimed that Splash was negligent in failing to disclose the tax liens; in failing to leave an emergency contact number after the closing; and in failing to sign the supplemental instructions to release funds on February 9th.

[32] But Splash had no duty to reveal liens assessed against another company. Nor was there a duty to provide an emergency contact number after the closing. The defense pertaining to Splash's failure to sign the supplemental instructions for the release of funds on February 9th was also properly dismissed. The Law Firm admitted that it designed the supplemental instructions to obtain release of the Law Firm from its liability for acting outside the scope of the original instructions. And the Law Firm did not require additional instructions from Splash in order to correct its mistake.

[33] ATTORNEY FEES

[34] The trial court found that the Law Firm had acted 'intransigently and in bad faith' throughout the proceedings, that its claims were 'patently frivolous' and that it had continued to pursue an 'irrelevant alter ego/nominee theory'. It found that the Law Firm's purpose in 'raising and pursuing these claims' was to harass Splash, and to make the litigation prohibitively expensive. The court assessed fees against Park, the Law Firm, and against Glen Prior individually, as a sanction for 'flagrant and repeated violations of CR 11.' The court found the award to be further supported by the frivolous lawsuit statute, RCW 4.84.185, the court's inherent equitable authority, and the Consumer Protection Act. The Law Firm contends that none of the grounds offered by the trial court support the award of fees. With respect to CR 11, the basis primarily relied upon by the trial court in its findings and conclusions, the Law Firm argues that it had no notice of Splash's intent to pursue sanctions, that the trial court did not adequately explain the grounds for imposing CR 11 sanctions, and that there was no hearing on the sanctions. CR 11 addresses two separate problems: baseless filings and filings made for an improper purpose. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 217, 829 P.2d 1099 (1992). The rule provides that an

attorney's or party's signature signifies that he or she has read the pleading, motion, or legal memorandum; that to the best of the party's or attorney's knowledge, information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. CR 11.

[35] If the rule is violated, the court may impose sanctions upon motion or on its own initiative. CR 11.

[36] This court reviews the imposition of CR 11 sanctions for abuse of discretion. Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994); Madden v. Foley, 83 Wn. App. 385, 389, 922 P.2d 1364 (1996). In deciding whether the trial court abused its discretion, we keep in mind the purpose of the rule, which is to deter baseless filings and curb abuses of the judicial system. Biggs, 124 Wn.2d at 197. The abuse of discretion standard recognizes that deference is owed to the judicial actor who is better positioned than another to decide the issue in question. Washington State Physicians Ins. Exch. & Assoc., v. Fisons Corp.,

122 Wn.2d 299, 339, 858 P.2d 1054 (1993). Accordingly, we give deference to a CR 11 award and do not lightly overturn a court's decision to sanction. Nevertheless, a trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. Fisons, 122 Wn.2d at 339.

[37] CR 11 procedures must comport with the due process requirements of notice and an opportunity to be heard. Bryant, 119 Wn.2d at 224. In Bryant, the court concluded that the inclusion of a request for sanctions in a reply brief constitutes notice within the requirements of the due process clause. Bryant, 119 Wn.2d at 224. The court noted that because the notice was given prior to oral argument, the sanctioned party had the opportunity to address the issue. Bryant, 119 Wn.2d at 224. In Biggs v. Vail, the court held that a party must have notice of an allegation of a CR 11 violation, but that 'notice in general that sanctions are contemplated is sufficient for the later imposition of CR 11 sanctions.' Biggs, 124 Wn.2d at 199. We are aware of no authority for the proposition that a special hearing must be scheduled for the purpose of deciding whether CR 11 sanctions will be imposed.

[38] The Law Firm had notice of and the

opportunity to address the issue of sanctions because Splash stated in its trial brief that Splash intended to seek sanctions specifically under CR 11. The complaint also contains general notice of intent to seek attorney fees, without stating the grounds. In granting summary judgment as to breach a fiduciary duty, the court determined there was no merit to the argument that Park reasonably concluded that the liens attached to Splash's property. The court also ruled pretrial that it was 'frivolous' to contend that the United States had an interest in the action, and denied the Law Firm's motion to reconsider that issue. Yet, throughout trial, and even after the judge gave a warning, the Law Firm continued to pursue the claim that the liens filed against Visible attached to Splash's property. We find the Law Firm had ample notice and opportunity to address the court before the imposition of sanctions.

[39] The Law Firm also contends that the record is insufficient for appellate review of the CR 11 sanctions. However, the court found that the Law Firm had raised claims that were both 'frivolous' and were filed for the improper purpose of harassment and delay. In her oral ruling, the judge further explained that she did not find that 'any of the defenses were meritorious' and that the Law

Firm had continued to pursue the frivolous defenses as 'a misguided attempt to pursue self protection' even after her warnings that she would not consider the prior rulings. We conclude that the record adequately sets forth the court's reasons for purposes of our review.

[40] Accordingly, we affirm the award of fees under CR 11. Because the award of fees under CR 11 was not an abuse of discretion, the court was also within its discretion in sanctioning ***Glen Prior*** individually, although he was not a party to the action. See CR 11 (the court may sanction a party or an attorney representing a party). Because fees were properly awarded under CR 11, we need not consider whether the sanction was also justified on the other grounds invoked by the trial court.

[41] PROCEDURAL MOTIONS

[42] The Law Firm also appeals the trial court's rulings on various motions: its motion to compel discovery, its motion to continue trial, its motion to compel Splash to subpoena witnesses, and Splash's motion to exclude witnesses. The Law Firm's arguments depend on the viability of its theory that Splash was liable for the tax liens against Visible because Splash was an alter ego of Visible. But the court had already ruled that the

liens were unrelated to Splash, and the Law Firm has failed to demonstrate any error in that ruling. The record supports the court's conclusion that Splash adequately responded to specific discovery requests. The Law Firm has not shown how further discovery would have been likely to lead to the production of relevant evidence.

[43] The Law Firm's argument that two Splash employees were necessary witnesses on the issue of damages was not presented to the trial court and therefore we do not consider it. We conclude that the trial court did not abuse its discretion in its rulings on these motions.

[44] MOTION TO ADD GLEN PRIOR AS A DEFE

[45] Post trial, Splash moved to add Glen Prior as a defendant and judgment debtor under CR 21. Splash argued that Prior's personal involvement as Park's supervisor justified adding him belatedly as a defendant and that because Prior had been present throughout the trial, he would not suffer any prejudice. Splash asserts in its cross appeal that the court erred in denying its motion.

[46] Under CR 21, 'Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the

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action and on such terms as are just.' The decision as to whether to add a party under this rule is discretionary with the trial court. Shelby v. Keck, 85 Wn.2d 911, 918, 541 P.2d 365 (1975).

[47] Splash relies on Betchard-Clayton, Inc. v. King, 41 Wn. App. 887, 707 P.2d 1361 (1985), in which the appellate court upheld the trial court's decision to pierce the corporate veil and add two individual corporate officers as defendants at the end of trial. But Betchard does not suggest that a court must always add a party upon request if the party to be added has been present or has participated in the trial. The court's discretion to deny joinder requested under CR 21 is broad, and the facts of Betchard are distinguishable. In that case, the plaintiffs obtained new information late in the trial from which they learned that they should have sued the individual officers rather than the corporation. Here, there is no apparent reason why Splash did not sue Prior initially, or why Splash did not move to join him as a party until after trial. The court did not abuse its discretion in denying Splash's motion to add him as a defendant post trial.

[48] ATTORNEY FEES ON APPEAL

[49] Splash requests attorney fees and costs on

appeal under RAP 18.9(a) which allows the court to award fees based on the filing of a frivolous appeal. An appeal is frivolous if, when viewed as a whole, the appeal is so devoid of merit that there is no reasonable possibility of reversal. Streater v. White, 26 Wn. App. 430, 434, 613 P.2d 187 (1980).

[50] The Law Firm has put forth no meritorious arguments as to why any of the evidentiary and discovery rulings below constitute error. As below, the Law Firm's argument in regard to the breach of fiduciary duty issue ignores the facts of the case. The trial court's sound decision to impose CR 11 sanctions put the Law Firm on notice that an appeal would also be regarded as frivolous. Because there was no reasonable possibility of reversal, we award attorney fees on appeal under RAP 18.9.

[51] Affirm. ss/ A.C.J. Becker, J. Cox, and J. Coleman.

Excerpt from trial court transcript (Superior Court, County of King, 98-2-04718-6 SEA, COA No. 45076-0-I, Splash Design v. Lee, Law Firm of Glen Prior, Inc., P.S., and Karl Park) dated July 12, 1999, beginning on page 208.

Pg. 208:

MR. PRIOR: I will call Mr. James Jameson to the stand.

JAMES JAMESON

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PRIOR:

Q. Please state your name.

A. James J. Jameson, J-A-M-E-S-O-N.

Q. Do you know Meesaun Lee?

THE COURT: We need your business address.

THE WITNESS: 805, 16th Southeast, Suite 206, Mill Creek, Washington 98012.

Q. Do you know Ms. Meesaun Lee?

A. Yes, I do.

Q. From where do you know her?

A. She is a client of mine.

Q. Was she a client of yours regarding the escrow with Mr. Park?

A. Yes, with this sale of the store, from Splash Design.

Q. When did she first hire you for that?

(Pg.209) I have made a little chart on the board, if that helps a little bit.

A. It would have been after the signatures and after the problem arose with the task lien problem. It would be the first few days of February. I can't tell you exactly, but it is within the first couple days of February.

Q. That would be after a check was stopped?

A. That is correct.

Q. So the check was stopped on February 2nd. Did you get ahold of Mr. Park after that?

A. I am sure that I did.

Q. What transpired from that?

A. Well, I believe that I contacted Mr. Park and I also FAXed a letter to Mr. Kovach trying to let me know what my involvement was and what we were trying to do.

My contact with Mr. Park was verbal, I believe, and trying to find out what exactly his point of view was the problem. Because basically my client wanted to get the problem resolved one way or the other. He wanted to get rid of the store and go on about life and not have to deal with this any more.

Q. Was Splash at this time represented by counsel?

A. Mr. Kovach had actually, I think, drafted some sort of settlement agreement and sent it directly to (pg.210:) Ms. Lee. She had that agreement with her. It was the first time that she came in to see me.

I know that Mr. Kovach was involved, when I first got involved.

Q. So was there a settlement between you and Mr. Kovach?

A. I believe that there was. After we spoke, there was an agreement to withhold $10,000 from the sale

proceeds and that the rest of the funds would be tendered to the sellers.

Q. Did you FAX that agreement over to Mr. Park?

A. Yes. I FAXed a short note that basically said: "Here is what we have agreed to do."

Q. Would you please turn to Exhibit 49. Do you recognize that?

A. Are you talking about the one that says "number 31" at the bottom?

Q. Yes, dated February 6.

A. Yes.

Q. Do you recognize this letter?

Yes.

Q. What is it?

A. It appears as though that it is a letter to Mr. Park, where I kind of confirmed what I had found out to that point. It looks like what I am trying to (pg.211:)do is to resolve the situation.

Q. In that letter, with the third paragraph of that letter, are you making a demand on Mr. Park?

A. Yes, demanding that the proceeds would be held until joint instructions are submitted by the buyer and the seller as to how the proceeds should be distributed.

Q. This is also -- or was this also FAXed to Mr. Park on that same day?

A. I believe so. I am sure that it would have been. Time is of the essence at this point in the process.

Q. In that third paragraph it also says: "This letter is written to confirm that those proceeds are still in the trust account."

Why did you need confirmation on that?

A. I received that verbally from Mr. Park. I think

that it is best to have a confirmation, to make sure.

Q. What happened after February 6th?

A. I think that February 6th would have been on a Friday, I believe. The following Monday would have been February 9th. At that time, I believe that Mr. Kovach and I spoke about the $10,000 withhold and agreed that is what we would agree to do (pg.212):Q.

That is on February 9th?

A. That. is correct.

Q. Let's go to Exhibit 15, please.

A. I have that.

Q. Do You recognize this?

A. Yes.

Q. What is that?

A. That is a letter that I FAXed to Mr. Park, confirming that the agreement that I reached with Mr. Kovach, that there would be $10,000 withheld from the seller's proceeds, then he could go ahead and release the remaining funds.

Q. Then you also stated in here, "if this letter is not sufficient to allow you to release funds, or if you have any questions, please feel free to contact me."

That is correct.

Q. Did you receive a fax from Mr. Park on that same day?

Yes.

Q. What did that FAX say?

A. I think that it was a supplemental instructions, closing instructions that he had FAXed out. There may have been a letter with it also. But I know that there were supplemental closing instructions

(Pg.213:) that he wanted signed.

Q. Please turn to Exhibit 51.

A. I have it.

Q. Is this the document that was FAXed to you?

A. It appears to be, yes.

Q. When you received that, what did that indicate to you?

A. That this was something that Mr. Park wanted signed before releasing the funds.

Q. Did you talk this over with Mr. Kovach?

A. I am sure that at some point, I don't know if it was that day. I believe that I got Meesaun in the same day to sign. But as I recall, on that same day, there was a problem in that while this was going on, I believe that Mr. Stewart, at least this is what I received from other parties.

But Mr. Stewart went down to try to collect the fund from Mr. Park. He couldn't get them and was very unhappy, and it just created more problems, I believe. But I am not sure if I specifically spoke with these joint escrow instructions with Mr. Kovach that very day. But I am sure at some point that I did.

Q. When you did speak with Mr. Kovach about those instructions, what was his response?

A. I think that his response was that he didn't

(pg.214:) believe it was necessary that the letter of instruction was that I had FAXed down previously, the February 9 letter should have been fine.

He didn't believe that anything further needed to be signed in order to release those funds.

Q. Let's go to Exhibit 17. Do you recognize this?

A. Yes.

Q. What is that?

A. After the Monday, February 9 activities, it seemed like all of a sudden everything quietedly down and I didn't hear anything.

Meesaun had contacted me to ask, you know, what is going on. So I can't remember if I tried to contact Mr. Kovach and he was unavailable or what. I FAXed this letter to Mr. Kovach to say, "we are still on leaning to make this thing go. I haven't heard from anybody."

Q. What did you mean in the first paragraph starting with "in the interim"?

A. Basically, that I didn't know where the problem was, but for some reason the money wasn't changing hands to Mr. Stewart for Splash Designs.

I didn't know what Splash Designs intention was at this point. It was hard to know, because they weren't getting any money and they were upset.

(Pg.215:)I know that Mr. Park wasn't about to release any money until he got what he wanted. There was this back and forth. I wanted them to be aware and my client wanted me to make them aware, that we stand ready to go on this deal as soon as the details can be worked out.

Q. In that paragraph you say that "the offer is still open, the offer is open"?

A. Yes.

Q. So was it your opinion at that point that the prior agreement that you had was no longer valid?

A. At that point I didn't know exactly where we were at. Honestly, that is the part that is really the main reason to write the letter, was I hadn't heard anything for a few days, when prior to that it seemed like things were

going fast and furious.

I was kind of concerned that this didn't sit here for a while and all of a sudden a lawsuit comes out, because nobody has talked. I guess I wasn't one hundred percent sure where we were at that point.

Q. Turning to Exhibit 54, please. Do you recognize that exhibit?

A. Yes.

Q. What is that?

A. It is letter -- same exhibit as, it is the (Pg.216:)same, the joint escrow and closing instructions, the settlement statement that was requested to be signed by the parties back on February 9th. But this document contains Ms. Lee's signature.

Q. At that point did you feel that the funds would be released?

A. I believe that by that time, my understanding, I don't know, I may be incorrect, maybe that nobody from Splash ever signed this.

But that was my understanding was that if I FAXed this down, that they were going to get released regardless of whether Splash signed it or not. I don't know whether they ever did.

Q. Was that the case?

A. Yes. I FAXed it down on. I believe that it was the 19th of February. The funds were, I think, released within, I couldn't tell you, but I know that it is shortly thereafter.

MR. PRIOR: At this point, your Honor, I will
offer into evidence Exhibits 49, 15, 51, 16, 17 and 54.

THE COURT: Any objection?

MR. KOVACH: Exhibits 15, 16, 17, 1 think

are already in, your Honor.

THE COURT: Yes, I believe so.

MR. KOVACH: Plaintiff has no objection to (Pg. 217:)Exhibit 49 or to Exhibit 54.

May I voir dire as to Exhibit 51, briefly?

THE COURT: Yes.

(Exhibits No. 49 and 54 received in evidence.)

VOIR DIRE EXAMINATION

BY MR. KOVACH:

Q. Mr. Jameson, on Exhibit 51, the sheets suggest that these were sent to you and I at 5:45 and 5:50 to me.

Is that your recollection of when this materi was sent to you?

A. Honestly, I couldn't say. That wouldn't surprise me, if it wasn't until late in the day,because I am not sure if my FAX of February 9 to Mr. Kovach has a time on it. But it seemed like that might have been in the afternoon.

Q. Actually, your FAX to Mr. Park was at 2:20, according to the date line?

A. This obviously came afterwards.

Q. Meesaun signed on the 9th. Did she come into your office after 6 o'clock to sign?

A. May have, I don't recall.

MR. KOVACH: No objection, your Honor.

THE COURT: Exhibit 51 is admitted.

(Pg. 218)(Exhibit No. 51 received in evidence.)

DIRECT EXAMINATION

BY MR. PRIOR:

Q. (Continued.) Was there any discussion on returning the property pack to Splash at this time?

A. I believe that prior to my February 6th letter, which was kind of the letter that I did FAX to Mr. Park, saying here is one of the things that we discussed.

There was a point in time, I don't know if I was really involved when that really started, when I believe that Mr. Stewart was saying, told my client and told Ms. Lee that he either wanted her to, he needed the money, or he needed the store back.

Q. Did you know that Mr. Stewart at that time was an agent for Splash?

A. I just assumed so, because he was the person who was doing everything. So I don't know.

Q. Did you ever receive any information from Splash authorizing Randy Stewart to discuss this matter with you?

A. No, the only person that I ever spoke with was Mr. Kovach. I didn't know. I don't know necessarily to the date what the relationship is.

MR. PRIOR: No further questions, your Honor.

(Pg.219:)THE COURT: Any questions?
CROSS EXAMINATION BY MR. KOVACH:

Q. Meesaun signed the joint escrow instruction on the 9th of February. Is that correct?

A. I believe that is correct.

Q. You didn't FAX them to Mr. Park until 10 days later, is that also correct?

A. That is definitely correct.

Q. Why is that?

A. Well, my understanding from Mr. Park is that he wanted signatures from both sides. That didn't sound like that was going to happen.

I really didn't want to put Ms. Lee in a position where she signed something that may or may not take place. So once Mr. Park said, "I don't care I am going to release the funds if you FAX this," Meesaun said, "go ahead and do it." That is the only reason.

Q. Did you have any concerns about releasing the defendants from liability?

A. Yes.

Q. What were those concerns?

A. Well, that if ever wound up in litigation, that wanted to make sure that my client was the one who was the fault person as the person who made the mistake
(Pg.220:)was.

MR. KOVACH: Thank you. No further questions.

THE COURT: Thank you. You may step down. You are excused.